EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

87-861

Supreme Court, U.S.
FILED
NOV 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

Teamsters Local No. 728

Petitioner,

vs.

Leo Douglas Mims

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Fredrick C. McLam
High House Law Offices
309 Sycamore Street
Decatur, Ga. 30030
404-373-4562

Counsel for Petitioner

QUESTIONS PRESENTED

I. Did the District Court abuse its discretion in denying an award of attorney fees under the "common benefit" exception of Hall v. Cole?

II. Is the District Court precluded from awarding attorney fees to a prevailing party proceeding under Section 481 (c) of Title IV of the LMRDA of 1959, 29 U.S.C. Section 481 (c)?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	1
LOWER COURT DECISIONS	2
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS	3-5
STATEMENT OF THE CASE	6-10
SUMMARY OF ARGUMENT	10-11
ARGUMENT	
I. THE DISTRICT COURT"S DENIAL OF ATTORNEY FEES UNDER THE "COMMON BENEFIT" EXCEPTION OF HALL V. COLE WAS NOT AN ABUSE OF DISCRETION	12-22
II. THE DISTRICT COURT IS PRECLUDED FROM AWARDING ATTORNEY FEES TO A PREVAILING PARTY PROCEEDING UNDER 481(c) OF TITLE IV OF THE LMRDA OF 1959, 29 U.S.C. SECTION 481(c)	22-24
CONCLUSION	24
CERTIFICATE OF SERVICE	25
APPENDIX	
I. OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS RENDERED JULY 21, 1987	26-30

II. ORDER OF THE ELEVENTH CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING DATED AUGUST 27, 1987 — 31

III. OPITION OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA RENDERED JULY 28, 1986 — 32-39

TABLE OF AUTHORITIES

Cases — Page

Calhoon v. Harvey 379 U.S. 134, 57 LRRM 2561 (1964) — 23

Hall v. Cole, 412 U.S. 1, 83 LRRM 2177 (1973) — 9-16 19,22,23

Statutes

Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. Section 412 (Title I) — 11,16, 23,24

Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. Section 481(c) (Title IV) — 3,6,9-11,13,22

LOWER COURT DECISIONS

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on July 21, 1987 and reported at 821 F 2d 1568. The opinion of the District Court for the Northern District of Georgia rendered July 28, 1986 is reported at _____ F Supp. _____. These decisions are reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1987. Rehearing was denied on August 27, 1987. This petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

29 U.S.C. Section 481(c)

Section 481. Terms of office and election procedures

(c) Requests for distribution of campaign literature; civil action for enforcement jurisdiction; inspection or membership lists; adequate safeguards to insure fair election

Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in

such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other

bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated offical thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

STATEMENT OF THE CASE

Plaintiff brought action for declaratory judgment and injunctive relief under 29 U.S.C. Section 481(c) seeking distribution of campaign literature. After a TRO hearing, the District Court issued its Order of March 3, 1986 requiring distribution of campaign literature through a commercial mailing house.

Plaintiff was a member of Teamsters Local Union No. 728 and a candidate for the position of delegate to the Teamsters Convention that commenced May 19, 1986. Plaintiff requested the Union to mail out campaign literature. The Union established and mailed to all candidates procedures for the mailing of campaign literature.

Subsequently, Plaintiff raised questions regarding the campaign literature mailing procedures with the Union, which were discussed and some questions resolved; but with the primary issue of "processing time" being brought before the District Court in a Temporary Restraining Order hearing on March 2, 1986. On the date of the TRO hearing, which was the first day that Plaintiff's literature was available for mailing, the Plaintiffs contended that because the election started March 12, they could not wait two to five days to have the Union process and mail the campaign literature and that a commercial mailing house could process and mail within one day.

After hearing arguments from both counsels, the District Court ruled as follows:

> "I am going to do this. I think this ought to go out to the membership. I think you are somewhat late to try and get it out, but I will give you an opportunity, since you're going to have an election. And I will let you use a commercial mailing service, but I will provide that the mailing labels must be brought by and this work must be done in the presence of the employee of the Union office." (Hearing Transcript, pg. 17, line 14-20).

The decision of the Court on March 2, 1986 was complied with by all parties and all further litigation was mooted except the present question of attorney fees.

The District Court's Order of July 28, 1986 denied Plaintiff's request for attorney fees on two grounds:

1. There is no statutory authorization for an award of attorney fees in an action brought pursuant to 29 U.S.C. Section 481(c), and

2. Even assuming the Court may award attorney fees under the "common benefit" exception of Hall v. Cole, the Plaintiff is not entitled to such an award under the facts of this case.

The Eleventh Circuit Court of Appeals reversed and remanded the decision of the District Court on July 21, 1987. First, the Eleventh Circuit found that the "common benefit" exception of Hall v. Cole may be applied to actions brought pursuant to Section 401 of Title IV of the LMRDA, 29 USC Section 481 (1982). Second, the Eleventh Circuit determined that under Hall v. Cole any

prevailing Plaintiff under Section 481(c) is entitled as a matter of law to attorney fees, by concluding "that when appellant sought legal assistance to vindicate his right to make a reasonable campaign mailing to the union electorate, he 'necessarily rendered a substantial service to his union as an institution and to all of its members.'"

SUMMARY OF ARGUMENT

I. The Eleventh Circuit's decision that an individual who successfully obtains an injunction under 29 U.S.C. Section 481(c) is entitled to attorney fees as a matter of law is a misapplication of the "common benefit" exception of Hall v. Cole. The Supreme Court in Hall v. Cole clearly left the issue of "common benefit" to the sound discretion of the District Court upon

the consideration of all facts in the case.

Upon the application of the "common benefit" exception of Hall v. Cole to this case, the District Court did not abuse its discretion with the denial of attorney fees to Plaintiff where the Plaintiff did not demonstrate any "overriding considerations" for the recovery or that any "substantial benefits on an ascertainable class of beneficiaries" was conferred by the litigation.

II. Since there is no statutory authorization for an award of attorney fees under Title IV of LMRDA, 29 U.S.C. Section 481 (c) and this is not a Title I proceeding, the Hall v. Cole "common benefit" exception is not applicable to this case.

ARGUMENT

I. THE DISTRICT COURT'S DENIAL OF ATTORNEY FEES UNDER THE "COMMON BENEFIT" EXCEPTION OF HALL V. COLE WAS NOT AN ABUSE OF DISCRETION

The Eleventh Circuit's award of attorney fees, in total disregard of the discretionary decision by the District Court, establishes a per se entitlement to attorney fees in direct conflict with the holding of this Court in Hall v. Cole. The Eleventh Circuit concluded "that when appellant sought legal assistance to vindicate his right to make a reasonable campaign mailing to the union electorate, he 'necessarily rendered a substantial service to his union as an institution and to all of its members.'" Thus the Eleventh Circuit is requiring the award

of attorney fees as a matter of law when any litigant obtains some type of injunction under 29 U.S.C. Section 481(c), regardless of the factual circumstances.

Such a holding is in direct contradiction to the decision of the Supreme Court in Hall v. Cole. Justice Brennan in writing for the Supreme Court in Hall v. Cole wrote the following:

> "federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require...and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery.'" (Hall v. Cole at 83 LRRM 2178)

> "Another established exception involves cases in which the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the Court's jurisdiction over the subject

> matter of the suit makes

> possible an award that will operate to spread the cost proportionately among them.'" (Hall v. Cole, 83 LRRM 2179)

> "We must therefore conclude that an award of counsel fees to a successful plaintiff in an action under Section 102 of the LMRDA falls squarely within the traditional equitable power of federal courts to award such fees whenever 'overriding considerations indicate the need for such recovery'...Thus, Section 102 does not 'meticulously detail the remedies available to a plaintiff,' and we cannot fairly infer from the language of that provision an intent to deny to the Courts the traditional equitable power to grant counsel fees in 'appropriate' situations." (Hall v. Cole, 83 LRRM 2180)

The decision of the Supreme Court in Hall v. Cole appears quite clear from the opinion written by Justice Brennan that under the "common benefit" exception the District Court has the equitable power to grant attorney fees when

appropriate. There is no per se granting of attorney fees under the Hall v. Cole decision.

This position of the Supreme Court becomes even more clear in the final paragraph of its decision as follows:

> "Moreover, although the presence of 'bad faith' is essential to 'fee-shifting' under a 'punishment' rationale, neither the presence nor absence of 'bad faith' is in any sense dispositive where attorneys' fees are awarded to the successful plaintiff under the 'common benefit' rationale recognized in Mills and operative today. Under that theory; counsel fees are granted, not because of the 'bad faith' of the defendant but, rather, because the litigation confers substantial benefits on an ascertainable class of beneficiaries. In that situation, the element of 'bad faith' of the defendant is simply one of many considerations best addressed to the sound discretion of the District Court. Under the facts of this case, we cannot say that the District Court abused that discretion." (Hall v.

> Cole, 83 LRRM at 2182) (emphasis added).

The decision of the Eleventh Circuit to override the equitable discretion of the District Court and apply its per se liability rule is in direct conflict with Hall v. Cole. In addition, the Eleventh Circuit's decision disregards the finding of the District Court (without identifying any abuse of discretion) that there is not present in this case any "overriding considerations" indicating the need for recovery by plaintiff of any attorney fees or costs. Such was the specific finding of the District Court.

> "However, even assuming that the Hall v. Cole rationale is still viable, this court finds that the "common benefit" analysis of Hall v. Cole is inapplicable to the case at bar." (RE. 12)

This action did not involve any Title I claim of a denial of the Bill of

Rights of any Union member. The issue in this case, as indicated above, was a narrow issue involving the distribution of campaign literature. There was never any allegation that the procedures provided by the Union for distribution of campaign literature were applied unequally to any Union members. In a bottom line analysis, the issue boiled down to how fast the campaign literature could be processed and mailed considering the time constraints of the election date. The Plaintiff wanted a one day mailing (that an outside non-union firm could provide), while the Union insisted on a Union staff mailing that required two to five days.

On the date of the TRO hearing, which was the first day that Plaintiff's literature was available

for mailing, the Plaintiffs contended that they could not wait two to five days to have the Union process and mail the campaign literature, because the election started March 12, and commercial mailing house could process and mail within one day.

After hearing arguments from both counsel, the District Court ruled as follows:

> "I am going to do this. I think this ought to go out to the membership. I think you are somewhat late to try and get it out, but I will give you an opportunity, since you're going to have an election. And I will let you use a commercial mailing service, but I will provide that the mailing labels must be brought by and this work must be done in the presence of the employee of the Union office." (Hearing Transcript page 17)

The District Court found the two parties in a "time warp" in which any additional delay might create further

litigation and/or delay a scheduled election. The Plaintiff's literature was not ready for mailing until March 2, the date of the Temporary Restraining Order Hearing and just ten days prior to the election. Under the Union's procedures, the literature could not be processed and mailed for two to five days. Without determining the cause of this "time warp," the District Court pierced the "time warp" with an immediate mailing of the campaign literature by an outside third party. This decision of the District Court was complied with by all parties and all further litigation was mooted except the present question of attorney fees.

In addition to the facts of this case which demonstrate this is not a case with any "overriding considerations" indicating the need for any attorney fee recovery such as in Hall v. Cole, it

also does not involve any "substantial service to the Union as an institution and to all of its members." The Eleventh Circuit found that plaintiff was conferring a benefit upon the entire union membership by seeking to mail out his campaign material. However, that was not the issue before the District Court, as there was never any refusal to mail plaintiff's campaign literature to the membership.

The key issue before the District Court was whether the plaintiff could use a non-union mailing service. The Union's campaign literature mailing procedures provided that the Union staff be utilized for the mailing process, even though it might take two to three days longer than an outside non-union company. The foundation of this rule cuts to the very heart of Union existence. The lifeblood of the

Union is to improve the wages, hours, working conditions and other economic advantages of all workers through organization, negotiation, and collective bargaining. To carry out this purpose and to protect and preserve the Union membership, it is important that the Union and its members foster and encourage the use of union labor.

The use of non-union labor to mail union campaign literature, as was done in this case, was cheaper and faster for Plaintiff, but did not enhance any substantive goal of the Union membership. The mailing house used in this situation had employees not represented by a union and receiving a non-living wage of $4.00 per hour. The use of this non-union labor did not confer a substantial benefit on the members of the Union, and in fact, violated the very

purpose for which the Union membership exists. Under these circumstances, and the discretion exercised by the District Court pursuant to the Supreme Court decision in Hall v. Cole, an award of attorney fees to the plaintiff was not justified.

II. THE DISTRICT COURT IS PRECLUDED FROM AWARDING ATTORNEY FEES TO A PREVAILING PARTY PROCEEDING UNDER SECTION 481(c) OF TITLE IV OF THE LMRDA OF 1959, 29 U.S.C. SECTION 481(c).

The Eleventh Circuit appropriately held that the appellant's complaint for injunctive relief arose solely under Section 401 of Title IV of the LMRDA, 29 U.S.C. Section 481(1982). That distinction is important because the

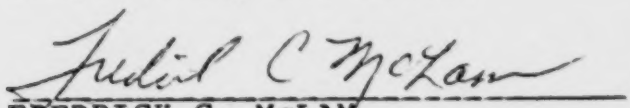
United States Supreme Court specifically recognized the significant difference between Title I and Title IV in Calhoon v. Harvey, 379 U.S. 134, 57 LRRM 2561 (1964). In Calhoon, the Supreme Court held that the jurisdiction of the Federal Court under Section 102 of Title I does not give the Federal Court jurisdiction to consider election issues which properly arise under Title IV. The distinction recognized in Calhoon is important because the Supreme Court's decision in Hall v. Cole was a Title I case and the jurisdictional language in Section 102 of Title I on which the Supreme Court in Hall v. Cole based their "traditional equitable power" to award attorney fees under the "common benefit" exception simply does not exist in Title IV. Thus, the decision of the Supreme Court in Hall v. Cole should be applied only

within it's true and limited contextof Title I.

CONCLUSION

Accordingly a Writ of Certiorari should issue to review the judgment of the Eleventh Circuit in that said judgment has decided a federal question in direct conflict with the applicable decisions of this Court.

Respectfully Submitted,



FREDRICK C. McLAM
Attorney for Petitioner

The High House
309 Sycamore Street
Decatur, GA 30030
(404) 373-4562

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he served three copies of this Document upon counsel for appellant by depositing them in mail, first class postage prepaid, addressed to: Arthur L. Fox II, Suite 700, 2000 P Street, N.W.< Washington, D.C. 20036.

FREDRICK C. MCLAM
Attorney for Appellee

The High House
309 Sycamore Street
Decatur, GA 30030
(404) 373-4562
Ga. Bar No. 495950

Dated: November 25, 1987

LEO DOUGLAS MIMS,
Plaintiff-Appellant,

versus

TEAMSTERS LOCAI NO. 728,
Defendant-Appellee.

No. 86-8653

Non-Argument Calender.

United States
Court of Appeals,
Eleventh Circuit

July 21, 1987.

Appeal from the United States
District Court for the Northern District
of Georgia.

Before TJOFLAT, HATCHETT and
CLARK, Circuit Judges.

TJOFLAT, Circuit Judge:

The sole issue in this appeal is whether the district court erred as a matter of law when it refused to award an attorney's fee to a union member who successfully obtained an injunction compelling his union to comply with his reasonable request for a campaign mailing to the union membership. Because the district court misapplied the "common benefit" exception of the "American rule" disfavoring the allowance of attorney's fees in the absence of statutory or contractual authorization, we reverse.

I.

The appellant, Leo Douglas Mims, is a member of Local Union No. 728 of the International Brotherhood of Teamsters (IBT).[1] In February 1986, he became a candidate for Local 728 delegate to the May 1986 IBT conven-

tion. Pursuant to section 401 of Title IV of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. Section 481(c)(1982),[2] appellant sought to have Local 728 mail his campaign literature to its membership. Local 728 imposed certain financial conditions and told appellant that the mailing could not be completed as promptly as he desired.[3] Nine days before the delegated election, appellant brought this suit and moved the district court, pursuant to Fed.R.Civ.P. 65, for an injunction compelling Local 728 to comply with his reasonable request to distribute his campaign literature to the union membership before the election.[4] After a hearing on appellant's request for preliminary injunctive relief, the district court ordered Local 728 to provide appellant a set of mailing

labels and ordered appellant to pay Local 728 $211, the approximate cost of generating the mailing labels.[5] Local 728 promptly complied with the district court's order.

Two weeks after the delegate election, appellant moved the district court, pursuant to Fed.R.Civ.P. 41(a)(2), to dismiss his action because "(Local 728) complied with the Court's order and fulfilled its legal responsibility under 29 U.S.C. Section 481(c), thereby causing the action to become moot." Appellant also moved for an attorney's fee award, which he had requested in his complaint for injunctive relief. The district court granted appellant's motion to dimiss the case but denied his motion for an attorney's fee.

II.

The American rule of fee shifting

is that "absent statute or enforceable contact, litigants pay their own attorney's fees." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257, 95 S.Ct. 1612, 1621, 44 L.Ed.2d 141 (1975) (citations omitted). A well-established exception to that rule is the "common benefit" exception:

> (This) exception involves cases in which the plaintiff's successful litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." "Fee shifting" is justified in these cases, not because of any "bad faith" of the defendant but, rather, because "(t)o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich others unjustly at the plaintiff's expense."
>
> Hall v. Cole, 412 U.S.

> 1, 5-6, 93 S.Ct. 1943, 1945-47, 36 L.Ed.2d 702 (1973) (citations omitted).

Invoking the "common benefit" exception, the Supreme Court has held that district courts may award attorneys' fees to individual union members who bring suit to enforce the "Bill of Rights" guarantees of Title I of LMRDA, see 29 U.S.C. Sub-Section 411-415 (1982). See Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). The Court reasoned that

> by vindicating his own right of free speech guaranteed by Section 101(a)(2) of Title I of the LMRDA, (the union member) necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the " chill" cast upon the rights of others. Indeed, to the

> extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs."

Id. at 8, 93 S.Ct. at 1948 (citation omitted). Even though Congress did not explicitly authorize the award of attorneys' fees in Title I "Bills of Rights" litigation, the Supreme Court nevertheless found that Congress could not have intended to create those rights without at the same time giving aggrieved union members the resources to finance litigation. Id. at 13-14, 93 S.Ct. at 1950.6

(1) Three of our sister circuits have adopted the logic of Hall to extend the common benefit exception to LMRDA Title IV cases in which union members sought attorneys' fees for

their role as intervenors in suits brought by the Secretary of Labor challenging union elections under section 402(a)(1) of Title IV of LMRDA, 29 U.S.C. Section 482(a)(1982). See Donovan v. CSEA Local Union 1000, Am. Fed'n of State, County & Mun. Employees, 784 F.2d 98 (2d Cir.), cert, denied. --U.S.--, 107 S.Ct. 74,93 L.Ed.2d 30 (1986); Brennan v. United Steelworkers, 554 F.2d 586 (3d Cir. 1977), cert. denied, 435 U.S. 977, 98 S.Ct. 1627, 56 L.Ed.2d 71 (1978); Usery v. Local Union 639 Int'l Bhd. of Teamsters, 543 F.2d 369 (D.C. Cir. 1976), cert. denied, 429 U.S. 1123, 97 S.Ct. 1159, 51 L.Ed.2d 573 (1977). Title IV of LMRDA gives the Secretary of Labor exclusive authority to bring post-election challenge suits. Aggrieved union members can participate in post-election challenge suits only

as intervenors in support of the Secretary's position. See Trbovich v. United Mine Workers, 404 U.S. 528, 530-37, 92 S.Ct. 630, 632-36, 30 L.Ed.2d 686 (1972). Despite the limited role aggrieved union members can play, these circuits have found that awards of intervenor attorneys' fees are justifiable because "the intervenor usually confers a substantial benefit on the union membership by identifying, investigating and presenting for the Secretary's ultimate prosecution, evidence of union violations of Title IV." Donovan, 784 F.2d at 103. For that reason, "the availability of attorney's fees is fundamental to the protection of union members' rights under Title IV." Id.

In our view, an even stronger argument can be made for the award of an attorney fee in the case before us than

in the Title IV intervenor cases we have cited. Section 401 of LMRDA's Title IV, 29 U.S.C. Section 481(c) (1982), under which appellant brought suit against Local 728, is the only privately enforceable provision in Title IV. An aggrieved candidate for union office cannot rely on the Secretary of Labor to bring suit to compel his union to comply with his reasonable request for a campaign mailing; the candidate must bring suit himself. Obviously, by seeking enforcement of his right to make a campaign mailing to the union membership, the candidate futhers his own election prospects; in other words, he benefits himself. In so doing, however, the aggrieved candidate confers a benefit upon the entire union membrship. See Yablonski v. United Mine Workers, 466 F.2d 424, 430-31 (D.C.Cir. 1972) (relevant question is

not whether union candidate pursues his own interest but "whether ... the trouble he takes results in the actual conferring of benefits on others than himself"), cert. denied, 412 U.S. 918, 93 S.Ct. 2729, 27 L.Ed.2d 144 (1973), cited with approval in Hall v. Cole, 412 U.S. 1, 8-9, 93 S.Ct. 1943, 1948, 36 L.Ed.2d 702 (1973).

(2) Appellant wished to send a mailing to the local membership informing them of his position on a variety of issues that would be addressed at the upcoming IBT convention. Because delegates at the convention would, among other things, adopt resolutions and elect IBT officers, a candidate benefits the entire union membership when he seeks to make them better informed voters. We conclude that when appellant sought legal assistance to vindicate his right to make a reasonable campaign mailing

to the union electorate, he "necessarily rendered a substantial service to his union as an institution and to all of its members." Hall, 412 at 8, 93 S.Ct. at 1948. Accordingly, we reverse the district court's order denying appellant attorney's fees and remand the case for an assessment of the appropriate fee for counsel's work in securing the injunction compelling Local 728 to comply with 29 U.S.C. Section 481(c)(1982), and in prosecuting appellant's application for an attorney's fee in the district court and in this court.

REVERSED and REMANDED.

1. Local 728 has approximately 7,000 members, living throughout the State of Georgia.

2. 29 U.S.C. Section 481(c) states the following:

(c) Requests for distribution of campaign literature; civil action for enforcement; jurisdiction; inspection of membership lists; adequate safeguards to insure fair election

Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate

with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

3. The Secretary-

Treasurer of Local 728 was Lamar Mathis, one of appel - lant's opponents in the delegate election. As our opinion makes clear, appel- lant is entitled to an attorney's fee not because Local 728 may have acted in bad faith, but solely because appellant's vindication of his right to make a reason able campaign mailing to the union electorate benefited the entire union membership. See Hall v. Cole, 412 U.S. 1, 5-6, 93 S.Ct. 1943, 1946-47, 36 L.Ed.2d 702 (1973).

4. Appellant brought his action pursuant to section 401 of Title IV of LMRDA, 29 U.S.C. Section 481(c) (1982), see supra note 2, and section 102 of Title I of LMRDA, 29 U.S.C. Section 412 (1982), which provides the following:

Section 412. Civil action for infringement of rights; jurisdiction

Any person whose rights- secured by the provisions of this subchapter have been infringed by any violation of this subchapter ("Bill of Rights of Members of Labor Organizations") may bring a civil action in a district court of the United States for such relief (including

injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located. As the district court correctly noted in its order denying attorney's fees, appellant did not allege or present any evidence showing that Local 728 had interfered with any right guaranteed him by LMRDA's bill of rights, see 29 U.S.C. Sub-Section 411-415 (1982). We therefore treat appellant's complaint for injunctive relief as arising solely under section 401 of LMRDA's Title IV, 29 U.S.C. Section 481 (1982), which governs "(t)erms of office and election procedures," and provides that any bona fide candidate for union office may enforce those procedures by bringing a civil action in district court.

5. In its order granting injunctive relief, the district court concluded the following:

Having heard argument from both parties, the Court is satified that plaintiff

has shown a reasonable likelihood of prevailing on the merits of his claim, that he and the Local 728 membership would suffer irreparable harm if injunctive relief were withheld, that any potential harm to defendant is speculative and unlikely, and that the public interest would be served by issuance of an injunction.

6. In its order denying attorney's fees, the district court questioned the continued efficacy of the Hall Court's common benefit analysis in light of the Court's subsequent decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), which denied attorney fees, under the "private attorney general" approach, to environmental groups that sued to bar construction of the trans-Alaska oil pipeline. We respectfully disagree with the district court because the "common benefit" exception was not at issue in Alyeska. See id. at 257-59, 95 S.Ct. at 1621-22. Thus, the Hall analysis remains undisturbed after Alyeska. See Erkins v. Bryan, 785 F.2d 1538, 1547 (11th Cir.) cert. denied, --U.S.--, 107 S.Ct. 455, 93 L.Ed.2d 402 (1986); see also Usery v.

Local Union No. 639 Int'l Bhd. of Teamsters, 543 F.2d 369, 382 (D.C.Cir. 1976), cert. denied, 429 U.S. 1123, 97 S.Ct. 1159, 51 L.Ed.2d 573 (1977), quoted with approval in Brennan v. United Steelworkers, 554 F.2d 586, 600 (3d Cir. 1977), cert. denied, 435 U.S. 977, 98 S.Ct. 1627, 56 L.Ed.2d 71 (1978).

IN THE UNITED STATES
COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8653

LEO DOUGLAS MIMS,
Plaintiff-Appellant,
versus

TEAMSTERS LOCAL NO. 728,
Defendant-Appellee.

Appeal from the United States
District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING

(August 27, 1987)

BEFORE: TJOFLAT, HATCHETT and CLARK
Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellee, Teamsters Local No. 728 is Denied.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
ATLANTA DIVISION

LEO DOUGLAS MIMS,	:	
	:	
Plaintiff,	:	
	:	CIVILACTION
v.	:	
	:	No.C86-454A
	:	
TEAMSTERS LOCAL UNION No. 728,	:	
	:	
	:	
Defendant.	:	
	:	

ORDER

This action for declatory judgment and injunctive relief was brought under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). Because of the court's order of March 3, 1986, all issues are now moot except for the plaintiff's request for attorney's fees in the amount of $7,970.91.

The plaintiff is a member of Teamsters Local Union No. 728 and was a candidate for the position of delegate

to the Teamsters Convention that commenced on May 19, 1986. When the plaintiff sought to have Local 728 mail his campaign literature to other union members throughout the state, Local 728 imposed certain financial conditions and also told the plaintiff that the mailing could not be done as promptly as the plaintiff desired. After a hearing on the plaintiff's request for injunctive relief, this court directed Local 728 to generate a set of mailing labels for the plaintiff and directed that the plaintiff pay approximately $211.00 for the production of those labels. The defendant complied with the court's order, thus mooting all of the plaintiff's demands (except for attorney's fees).

Although the plaintiff's complaint stated that it was being brought under 29 U.S.C Section 411(a)(2) (the free speech

provision of the Bill of Rights of Members of Labor Organizations contained in LMRDA), and 29 U.S.C. Section 481(c) (requiring a union to honor reasonable requests to distribute a candidate's campaign literature), the action, in reality, concerned only section 481(c). This is because there was no allegation and no evidence presented that Local 728 had in any way interfered with the plaintiff's freedom of speech except as it related to mailing his campaign literature. This fact was recognized by the plaintiff's counsel during oral argument on his request for injunctive relief when she stated:

> "Our action today is under Title IV of the LMRDA, the part that regulates the operation of union elections, which has been called the core of the Act. We are only concerned with a very narrow provision of Title IV !:1

> Section 481(c) which provides the district court with enforcement power to ensure that officers comply with their duties to comply with all reasonable requests of any candidate to distribute by mail literature at the candidate's expense.
>
> Transcript at 2-3.

This distinction is important, since the Supreme Court has held that a successful plaintiff, by vindicating his own rights under Title I, benefits all union members and is, therefore, entitled to an award of attorneys' fees. Hall v. Cole, 412 U.S. 1, 93 S. Ct. 1943 (1973). The Supreme Court has not considered whether a plaintiff who prevails in a suit under Title IV is, likewise, entitled to attorney's fees.

At least two Courts of Appeal have held that a union member who intervenes in a successful action brought by the Secretary of Labor under Title IV of the Act contesting a union election may be

entitled to attorney's fees. Donovan v. CSEA Local Union No. 70, 784 F2d 98 (2d Cir. 1986); Donovan v. Teamsters Local Union No. 70, 661 F.2d 1199 (9th Cir. 1981). However, both of those cases involved a challenge to the union election itself and, thus, are different from the case sub judice wherein only the reasonableness of the union's stance on mailing campaign literature is challenged. See also Marshal v. Teamsters Local Union No. 20, 509 F. Supp. 926 (N.D. Ohio 1981) (declining to follow the reason of the Second and Ninth Circuits).

In a case decided in a short time after Hall v. Cole, the Supreme Court reaffirmed the "American Rule," holding that, except for narrow exceptions, attorney's fees may not be awarded in the absence of a statute specifically authorizing such award. The Supreme

Court recognized that a court may assess attorney's fees for the willful disobedience of a court order, when the losing party has acted in bad faith, or when a party preserving or recovering a fund for the benefit of others in addition to himself may be awarded attorney's fees from that fund or property or directly from the other parties enjoying the benefit. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S. Ct. 1612 (1975). The Supreme Court's discussion of the "common benefit" exception in Alyeska Pipeline calls for a much stricter approach to that exception than allowed by the court in Hall v. Cole. However, even assuming that the Hall v. Cole rationale is still viable, this court finds that the "common benefit" analysis of Hall v. Cole is inapplicable to the case at bar.

A union member by vindicating his own free speech right may, thereby, vindicate the free speech rights of all union members, and a union member who successfully has an improper election set aside, thereby, vindicates the rights of all union members. However, no such vindication or common benefit occurs when it is only the individual union member's right to have his campaign literature mailed that is enforced.

Since there is no statutory authorization for attorney's fees in an action brought pursuant to Title IV of the LMRDA and since this court holds that the "common benefit" exception to this rule is inapplicable in the case at bar, the plaintiff's motion for attorney's fees is Denied. The plaintiff's motion to dismiss (recognizing that all issues except that of attor-

ney's fees were rendered moot by this court's order of March 3) is GRANTED.

SO ORDERED, this ____ day of July, 1986.

ROBERT L. VINING, JR.
United States District Judge

Supreme Court, U.S.
FILED
DEC 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-861

IN THE
Supreme Court of the United States
October Term, 1987

TEAMSTERS LOCAL No. 728,
Petitioner,

v.

LEO DOUGLAS MIMS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Arthur L. Fox II
(Counsel of Record)
Paul Alan Levy
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.,
Washington, D.C. 20036
(202) 785-3704

Attorneys for Respondent

December 1987

CASILLAS PRESS INC. – 1717 K ST NW WASHINGTON DC 20036 – 223-1220

IN THE

Supreme Court of the United States

October Term, 1987

No. 87-861

TEAMSTERS LOCAL No. 728,
Petitioner,

v.

LEO DOUGLAS MIMS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

MEMORANDUM IN OPPOSITION

In this case the court of appeals, relying on *Hall v. Cole,* 412 U.S. 1 (1973), held that attorney fees may be awarded to plaintiffs who confer a "common benefit" on their fellow union members by enforcing the requirement, in Title IV of the Labor-Management Reporting and Disclosure Act of 1959, that unions comply with reasonable requests to distribute candidates' campaign literature by mail. 821 F.2d 1568. The only other court that had previously considered that issue, *Yablonski v. UMW,* 466 F.2d 424, 430-431 (D.C. Cir. 1972), reached the same conclusion.

In arriving at this conclusion, the court of appeals also drew support from opinions by several other circuits, 821

F.2d at 1570, which held that *intervenors* in Title IV actions brought by the Secretary of Labor may also be awarded fees. That issue is not, however, presented here.

Petitioner contends that the lower court misinterpreted this Court's decision in *Hall v. Cole,* but neither points to a conflict in the lower courts over this question, nor suggests that this is a question of significance requiring this Court's attention. Petitioner also expresses disagreement with the court of appeals' conclusion that a common benefit was created on the particular facts of this case, and urges the Court to follow the district court's view of the matter instead of that of the court of appeals. Nothing in either of petitioner's arguments warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Arthur L. Fox II
(Counsel of Record)
Paul Alan Levy
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.,
Washington, D.C. 20036
(202) 785-3704

Attorneys for Respondent

December 1987